entered their appearance on 7 November 1991 and 24 January 1992 respectively and the application to substitute the plaintiff had been filed on 20 April 1992 and heard on 26 May 1992. The plaintiff also did not have a proper branch manager until July 1992. I had dealt on this issue quite extensively in *MBf Finance Berhad v. Hasmat Properties Sdn Bhd & 3 Ors* [1990] 1 CLJ 106 and *Public Bank Bhd. v. Malamaju Enterprise Sdn Bhd & Ors* [1989] 2 MLJ 112 and was of the view that the delay here is not inordinate and well explained.

Since there were no issues to be tried, I had granted the plaintiff's application for summary judgment against the defendants for RM1,144,466.36 and interest at 16.5 per cent per annum from 20 May 1991 until full settlement and costs.

BEE YA HOCK @ BEH AH HOCK

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & 3 ORS. AND ANOTHER CASE

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[ORIGINATING SUMMONS NO. 24-170-93(T) & 24-175-93(T)
11 MAY 1994

PREVENTIVE DETENTION: Deprivation of liberty - restricted residence order - Copies of orders issued by Deputy Minister of Home Affairs served on plaintiff - Whether in compliance with s. 3(i) of Restricted Residence Act 1933 - Question of certified true copy - Terms of order - Whether prison officer had informed the plaintiff - Place of residence - Whether plaintiff was given a chance to state place he desires in future to reside - Meaning of the word "shall" in the context of s. 3(i) of the Act.

In this case, by consent both the two applications were heard together for an *habeas corpus*. The main issue in this case, is, whether the orders issued by the Deputy Minister of Home Affairs pursuant to s. 2(ii) and 2A of the Restricted Residence Act 1933 and served on the plaintiffs were valid and the requirements of the provisions were complied.

Held:

[1] There has been a serious breach of the mandatory requirements of s. 3(i) of the Restricted Residence Act 1933, the effect of which is to render the restriction orders null and void.

[2] As the breach of a mandatory requirement can never be a trifling matter, it struck at the very core of the matter.

[Plaintiffs ordered to be released forthwith].

Cases referred to:

Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri Malaysia & 3 Ors. [1991] 2 CLJ 1301 SC ***(foll)***

M/s Hindustan Construction Co. Ltd. v. The Union of India (AIR) [1967] SC 526 ***(cit)***

Union of India v. Nirmal Singh [1987] AIR Allahabad 83 ***(cit)***

Patel Maganbhai Bapujibhai & Ors. v. Patel Ishwarbhai Motibhai & Ors. [1984] AIR Gujarat 69 ***(cit)***

Makhan Lal Sen Gupta v. The State [1958] AIR Calcutta 517 ***(foll)***

Federal US Co. v. Indiana, L & M Co. 176 Ind. 328 ***(foll)***
SMT Raziya Umar Bakshi v. Union of India [1980] Supreme Court Cases (Cri) 846 ***(dist)***
Ng Chai Yang v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & 4 Ors. [O.S. No. 24-6-1994 (T) (unreported)] ***(foll)***
Re Davis [1947] 75 CLR 409 ***(foll)***

Legislation referred to:
Restricted Residence Act 1933, ss. 2(i), 2(ii), 2A, 2A(i), 3(i)
Evidence Act 1872, ss. 62, 63(a)(2) (India)

For the plaintiffs - Manjit Singh; M/s Manjit & Co.
For the defendants - Mahmud bin Hj. Abdullah, FC

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:
Both parties agreed that as both these two applications have almost the same factual basis, they should be heard together. The first common question for determination was; Whether copies of the orders issued by the Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia ("the timbalan menteri") pursuant to s. 2(ii) and 2A of the Restricted Residence Act 1933 (Revised 1989) Act 377 ("the Act") and served on the plaintiffs in compliance with s. 3(i) of the Act were valid?

Briefly, the facts in both these applications are these. The plaintiffs were separately arrested at Pantai Remis, Perak on 3 July 1992, under s. 2(i) of the Act and on the same ground that: "Kamu adalah seorang penganjur judi ekor haram yang aktif di Pantai Remis, Perak, Darul Ridzuan" and brought to Pantai Remis police station for an hour and thereafter they were detained at Taiping prisons. On 18 July 1992, the timbalan menteri issued restriction orders under s. 2(ii) of the Act restricting the plaintiff in Originating Summons No. 24-170-93(T) to Bandaran Machang, Daerah Machang, Kelantan and restricting the plaintiff in Originating Summons No. 24-175-93 (T) to Bandaran Dungun, Daerah Dungun, Terengganu for three years each commencing from 18 July 1992 and placing each of the plaintiffs under s. 2A (i) of the Act under police supervision for the period.

The copies of the orders s. 2(i) of the Act were signed by the timbalan menteri above the typewritten words in brackets: (Dato' Megat Junid bin Megat Ayob). Mr Manjit Singh, learned Counsel for the plaintiffs, argued that the copies of these orders were served on the plaintiffs not in compliance with s. 3(i) of the Act. Section 3(i) of the Act read thus:

> When any such order as is referred to in s. 2(ii) or s. 2A has been made with reference to any person, he shall be taken before the officer in charge of the prison in which he is detained and the officer in charge shall inform him of the terms of the order and shall deliver to him a copy thereof and shall require him to state the place in which, consistently with the terms of the order, he desires in the immediate future to reside.

Mr Manjit Singh argued further that the pivotal point for determination rested on the interpretation of the word "copy" that appears in s. 3(i) of the Act.

In *Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri Malaysia & 3 Ors.* [1991] 2 CLJ 1301 SC, the Supreme Court had occasion to deliberate on the meaning of the word "copy" as set out in s. 3(i) of the Act. Their Lordships held that:

> ... the word 'copy' appearing in s. 3(i) of the Restricted Residence Enactment means a certified copy as provided under s. 63(a) of the Evidence Act or copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy as provided in s. 63(b). An unsigned order as in LWK 2 which was partly printed and partly typewritten and not authenticated or certified to be a true copy of the order signed by the Minister is in our view, not a copy of the Minister's order as envisaged in s. 3(i) of the Enactment.

The copy in *Lee Weng Kin's* case (*supra*) was unsigned by the Minister and merely bore rubber stamped words "T.T. Dato' Megat Junid B. Megat Ayob" in the space intended for his signature. In coming to their decisions, their Lordships in *Lee Weng Kin's* case (*supra*) considered the Indian Supreme Court's decision in *M/s Hindustan Construction Co. Ltd. v. The Union of India* (AIR) [1967] SC 526 and adopted the following passages found in the said judgment:

> Now the word "copy" as such is not defined in the Indian Evidence Act, 1 of 1872. But we get an idea of what a copy is from the provisions of s. 63 of the Evidence Act. That section *interalia* defines what secondary evidence means and includes, namely:
>
> (i) certified copies as provided in s. 76 of Evidence Act,
> (ii) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies, and

(iii) copies made from or compared with the original. Obviously, therefore, a copy means a document prepared from the original which is an accurate or true copy of the original.

In Webster's New Word Dictionary, the word "copy" means 'a thing made just like another, full reproduction or transcription.'

Wanchoo J. summarised the facts in *M/s Hindustan Consruction Co. Ltd. v. The Union of India* (*supra*) at page 527, right hand column, at paragraph (7) thus,

In the present case, the document was sent by the umpire along with a letter forwarding it to the Court. In the letter it was stated that he was sending the award duly signed and certified by him. Then turning to the document we find that it begins with the words "now I hereby reproduce a true copy of the said award which is as follows" and this is signed by Sri Dildar Hussain, the umpire. Then follows the copy of the award. At the end we find the words "certified as correct copy of the award, dated 27 May 1961." Underneath appears the signature of Sr. Dildar Hussain, the Umpire.

Even a cyclostyled copy of Government order must be proved in accordance with law. This was the view of the N.N. Mithal J. in *Union of India v. Nirmal Singh* [1987] AIR Allahabad 83. At page 85 of the judgment, his Lordship said:

The document is a cyclostyled copy of the covering letter as well as the Rules that had been framed. It also bears the signature of the authority who issued the same on behalf of the Director General, Ordinance Factories. These signatures are also in cyclostyle. The document, therefore, cannot be said to be a primary evidence of the letter and the Rules as approved by the Director General, Ordinance Factories.

In another part of the judgment, his Lordship said (page 85, left hand column, 10th line from the bottom):

... but where they are all copies of a common original, they are not primary evidence of the contents of the original. Thus, it would be clear from the above provision that copies made from the original was prepared by the authority of the Director General Ordinance Factories only had been circulated and the document relied upon by the the appellant (58-C) was merely a copy from the original. Thus, it cannot be said to be the primary evidence thereof. In this connection, reference may be made to the case of *Om Swaroop v. State* [1970] ALL WR (HC) 86.

In *Patel Maganbhai Bapujibhai and Ors. v. Patel Ishwarbhai Motibhai and Ors.* [1984] AIR Gujarat 69, it was held that where the document (A certified copy of the police statement of defendant no. 4) tendered in evidence was a hand-written copy of the original issued as true copy under the signature of the concerned officer, the same would not be admissible in evidence under s. 63(2) of the Evidence Act 1872 when it was not stated that it was a copy made from the original by mechanical process or copy compared with such copy. In such a case, subsection (3) of s. 63 of the Evidence Act 1872 also could not be pressed into service for admission of the copy in question as secondary evidence of the original.

In *Makhan Lal Sen Gupta v. The State* [1958] AIR Calcutta 517, it was held that a carbon copy of a search list with certain ink writings on its is not admissible under s. 62 of the Evidence Act 1872. When a mere glance at the document would show that even apart from the ink writings the whole of it could not have been made by one uniform process, it would not satisfy the requirements of s. 62 of the Evidence Act 1872 and other sections of the Evidence Act.

Reverting to the two applications, the undisputed facts would show that the orders under s. 2(ii) of the Act were partly printed and partly typewritten. The cancellations of some parts of the printed portions were duly initialled by the timbalan menteri and the full signatures of the timbalan menteri appeared at the right hand bottom columns above the typewritten words in brackets: (Dato' Megat Junid Bin Megat Ayob). Both parties agreed that the orders came in light brown printed forms (the original colours) that bore the words at the bottom: [Borang ini telah diterjemahkan oleh Jabatan Peguam Negara (Ruj. PN(Terj.) 397)]. Clearly, therefore on the facts, the copies are receivable in evidence as they are not cyclostyled copies or carbon copies or photostated copies but original copies bearing words partly printed and partly typewritten. The typewritten portions were carbonised. Unlike *Lee Weng Kin's* case (*supra*), the hand written signatures of the timbalan menteri appeared on the orders. The orders in these applications came squarely within the definition of the word "copy" in **Words and Phrases, Legally Defined,** 2nd Edn., Vol. 1, under the General Editorship of John B. Saunders, namely: "A copy is that which comes so near to the original as to give every person seeing it the idea

created by the original". As a postscript, it is germane to point out that carbon copies produced by typewriters may for all practical purposes be regarded as equivalent, though the impressions on the lower sheets are likely to be imperfect. They are produced by the same stroke which makes the surface impression. In *Federal U.S. Co. v. Indiana, L & M Co.* 176 Ind. 328, in the case of a machine carbon copy in triplicate, each one was held an original. Though the facts in the cases cited above are poles apart from the facts in these applications, yet the principles enunciated therein are still applicable. In *Lee Weng Kin's* case (*supra*), the Supreme Court rejected the carbon copy because it was not certified to be a true copy of the order signed by the Minister (see page 1303, second paragraph at C left hand column). In *M/s Hindustan Construction Co. Ltd. v. The Union of India* (*supra*), Wanchoo J. rightly pointed out that : "When a document is an accurate or true and full reproduction of the original it would be a copy." The same observations would apply to the orders in these applications. This point should rightly go to the defendants.

The second common question for determination was:

Whether the Officer in Charge of the Taiping prison had informed each of the plaintiffs the terms of the orders in compliance with s. 3(i) of the Act?

It was alleged that Wan Ibrahim bin Wan Yusof ("Wan Ibrahim") deposed an affidavit in each of these two applications in his capacity as the Penguasa Penjara Taiping adverting to the purported compliance with s. 3(i) of the Act in particular that part where Wan Ibrahim was said to have explained the terms of the orders s. 2A(i) and 2(ii) of the Act to each of the plaintiffs. The relevant part of Wan Ibrahim's affidavits affirmed on the same day i.e. 8 January 1994 reads thus:

> Saya telah memberitahu dan menerangkan syarat-syarat yang terkandung di dalam perintah-perintah tersebut di dalam Bahasa Malaysia yang mudah difahami kepada plaintif dan plaintif mengakui memahami apa yang saya terangkan.

The reverse portions of the orders under s. 2A(i) of the Act bore typewritten statements by Wan Ibrahim (dated and signed by him) to the effect that, firstly, he had explained the conditions imposed by that section to the plaintiffs, secondly, the plaintiffs understood them, and thirdly, he had also served on each of the plaintiffs the orders under that section. These set of facts were admitted by the plaintiffs on the reverse portions of the orders under s. 2A(i) of the Act by way of typewritten statements which were dated and thumb-printed by the plaintiffs. Another interesting feature appearing on the reverse portions of the orders under s. 2A(i) of the Act was the rubber stamped words:

> Telah diterangkan oleh saya dalam Bahasa Hokkien
>
> .....
>
> (Signed)
> Jurubahasa
> Penjara Taiping.

It should be mentioned here that the word "Hokkien" was handwritten on the dotted lines provided therein presumably to enable the interpreter from the Taiping prison to state the language being used in the course of the translation to the detenu.

Surprisingly, what appeared on the reverse portions of the order under s. 2A(i) of the Act were not reflected on the reverse portions of the orders under s. 2(ii) of the Act and this brought forth an argument by Mr Manjit Singh that the contents of the orders under s. 2 (ii) of the Act were not read, translated and explained to the plaintiffs by Wan Ibrahim via the intepreter from the Taiping prison. The matter was confounded further by the absence of an affidavit by the intepreter from Taiping prison.

Encik Mahmud bin Hj. Abdullah, the learned FederalCounsel for the defendants, argued that the plaintiffs did not specifically say in their affidavits that they could not understand the explanation of the terms of the orders by Wan Ibrahim nor did they allege that the interpreter from the Taiping prison did not explain and translate the contents of the orders to them and, consequently, there was no need for the interpreter from Taiping prison to swear an affidavit to that effect. It was argued further by Encik Mahmud that the plaintiffs did not plead in their affidavits that the grounds of their detention were couched in Malay language, a language which the plaintiffs did not understand at all and that these grounds were not explained to them.

On facts, the case *SMT Raziya Umar Bakshi v. Union of India* [1980] Supreme Court Cases

(Cri) 846 could easily be distinguished. There, there were specific allegations in the affidavit of the detenu that he did not know English and that the grounds of detention were in English and no vernacular translation of the grounds were explained to him in a language known to him. Though there was an affidavit by Mr P.M. Shah, on behalf of the detaining authority, stating that the grounds were explained to the detenu in the language known to him and it was averred further by Mr P.M. Shah that Inspector Sharma had explained to the detenu the order of detention, yet no affidavit of Inspector Sharma was filed. The absence of the affidavit of Inspector Sharma, the so called interpreter, led his Lordship Fazal Ali J (see page 847) to conclude that:

> The service of the ground of detention on the detenu is a very precious constitutional right and where the grounds are couched in a language which is not known to the detenu, unless the contents of the grounds are fully explained and translated to the detenu, it will tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention *ex facie*.

However, in the present applications, the absence of an affidavit by the interpreter from Taiping prison would not be fatal and Encik Mahmud rightly pointed out that there was no need for the interpreter of the Taiping prison to affirm an affidavit as the plaintiffs did not make specific allegations like the detenu in *SMT Raziya Umar Bakshi's* case.

I have said elsewhere that in a contest of affidavits, the parties must put their thoughts on paper and not to hide them. Affidavits, properly drafted would be able to identify the issues. In this way, no party would be caught by surprise. Clearly, therefore the points raised by Mr Manjit Singh were not deposed in the affidavits of the plaintiffs and the defendants cannot be held accountable to the plaintiffs (*Ng Chai Tang v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia* & 4 Ors. [Originating Summons No: 24-6-1994 (T) (unreported)]. The system of affidavits has not been designed to be weighted in favour of one party but to ensure, as has been said time and again, that there is fair play between the parties and that each party knows what issues he has to meet on the affidavits in advance. At any rate, on 3 July 1992 at 9.35 a.m. for Originating Summons No. 24-170-93 (T) and on the same date at 10.40 a.m. for Originating Summons No. 24-175-93 (T), when the plaintiffs were arrested by Inspector Dev Kumar a/l M.M. Shree with the warrants of arrest and detention signed by the timbalan menteri under s. 2(i) of the Act, the reasons for their detention were explained by the said Inspector via Detective Lance Corporal 65414 Sho Soo Kheng. Both the Inspector and the Detective Lance Corporal affirmed affidavits to that effect. Furthermore, it is manifestly clear that the orders s. 2(ii) of the Act restricted the plaintiffs to their respective areas as stated in the early part of this judgment for a period of three years each and this was again repeated in orders under s. 2A(i) of the Act with the relevant police supervisions imposed on each of the plaintiffs for the duration of that period. Now, since the reverse portions of the orders under s. 2A(i) of the Act bore the particulars as stated in the early part of this judgment, and that such particulars were not denied by the plaintiffs in their affidavits, the submissions of Mr. Manjit Singh that the plaintiffs were not explained the contents of the orders under s. 2(ii) of the Act (bearing in mind again that the orders in s. 2(ii) of the Act were repeated in s. 2A(i) of the Act and the absence of the allegations of Mr. Manjit Singh in the plaintiffs' affidavits) would certainly fall flat to the ground like a deck of cards. This point fails.

The third and the last common point raised by the plaintiffs was:

> Whether the officer in charge of the Taiping prison had complied with the final part of s. 3 (i) of the Act?

That final part of s. 3(i) of the Act reads as follows:

> ... and shall require him to state the place in which, consistently with the terms of the order, he desires in the immediate future to reside.

Wan Ibrahim in paragraphs 4 of his affidavits averred, in regard to this final part of s. 3(i) of the Act, tersely in one short sentence:

> Saya telah bertanya kepada plaintif mengenai tempat ia ingin tinggal di tempat sekatannya.

Obviously, this short sentence do not reflect well on the defendants. The defendants are obliged to state where the plaintiffs would like to reside in the immediate future.

In *Re Davis* [1947] 75 CLR 409, Starke J. at pages 418, 419 said in relation to the word "shall" in the following terms:

> The word 'shall' does not always impose an absolute and imperative duty to do or omit the act prescribed. The word is facultative: it confers a faculty or power ... The word 'shall' cannot be construed without reference to its context.

In my judgment, in the context of s. 3(i) of the Act, the word 'shall' is used to express that something must be done. Here, the defendants must state the places where the plaintiffs desire to reside in the immediate future. This was not done and it follows, therefore, that there has been a serious breach of the mandatory requirements of s. 3(i) of the Act, the effect of which is to render the restriction orders null and void. Put in another way, once a breach of a mandatory statutory requirement is established, the fact that the plaintiffs were not prejudiced is totally irrelevant. The maxim de minimis *curat lex* (the law does not concern itself with trifles) has no application in such a case as the breach of a mandatory requirement can never be said to be a trifling matter. It struck at the very core of the matter. This point goes to the plaintiffs.

The plaintiffs, for the reasons adumbrated above, should be released forthwith.

CHARLES MURIEL

v.

NEWACRES SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[CIVIL APPEAL NO. R1-12-129 OF 1992]
19 JANUARY 1994

HOUSING DEVELOPERS: Claim for liquidated damages for late delivery - Date of delivery of vacant possession - Whether vacant possession can be given without connection of water and electricity supplies.

The plaintiff entered into sale and purchase agreements with the defendant on 15 May 1982 for the purchase of two lots of houses. It was a term of the agreement that the houses would be completed within 18 months of the signing of the sale and purchase agreements. The agreements also contained a clause for the payment of liquidated damages for late delivery.

The defendant failed to deliver the houses within the time stipulated and the plaintiff sought to recover damages. The learned trial Court Judge found that the date of delivery of vacant possession was at the expiration of 14 days after the receipt of the letter from the defendant enclosing the architect's certificate of final completion and awarded liquidated damages for a period of 36 days.

On appeal the plaintiff contended that at the time when the defendant issued their letter, water and electricity connections had not been provided to the premises and submitted that vacant possession can only be given when these two services can be connected after payment of the two deposits for their supply.

Held:

[1] Following the case of *Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn. Bhd.* [1990] 1 MLJ 15, the relevant date for the delivery of vacant possession should be the date water and electricity supplies were provided to the premises.

[2] The facts of the case show that on the date of the defendant's letter enclosing the certificate of final completion, water and electricity supplies had not been connected to the premises and the learned trial Judge was in error in dismissing the plaintiff's contention that the